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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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January 15, 1993

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QUESTION PRESENTED FOR REVIEW

(1) Whether an association challenging an affirmative action ordinance must plead and prove actual or imminent injury with particularity to satisfy constitutional standing?

LIST OF INTERESTED PARTIES

The Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America (hereinafter referred to as "AGC"), and the Respondents, City of Jacksonville, Florida and Tommy Hazouri, in his official capacity as Mayor of the City of Jacksonville (hereinafter referred to as "City"), were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit. Tommy Hazouri is no longer Mayor of the City of Jacksonville. Pursuant of Rule 35.3 of the Rules of this Court, the City has substituted the current Mayor, Ed Austin, in the caption of this case.

None of the parties has any parent companies or subsidiaries. AGC is affiliated with the Associated General Contractors of America, a non-profit corporation.

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STATEMENT OF THE CASE

The AGC in its statement of the case omits highly relevant information regarding the precise nature of the challenged affirmative action ordinance.

The City's ordinance is directed at increasing the participation of minority business enterprises in government procurement. It establishes an affirmative action program allocating up to ten percent of certain contracting opportunities for minorities. The ordinance does not dictate a mandatory quota requiring a certain number of contracts to be let. Sections 126.604(a), 126.604(b)(3), 126.605(a)(4) and 126.605(b)(3) declare that mathematical certainty is not required in reaching the goals. Petition Appendix at A.15-21. Moreover, Section 126.608 contains a discretionary provision whereby the chief purchasing officer upon evidence of, among other things, the unavailability of minority businesses and the City's cost in meeting the goals, may waive the program's application. Petition Appendix at

A.24. Section 126.608 also states that when a project is waived, the City may reduce the goal by that amount. *Id.*

Amended Section 126.613 contains a specific durational period of five years from October 1, 1988. Petition Appendix at A.26-27. Upon its expiration, the City Council may reenact the ordinance if the disparity in minority business participation has not been remedied. Id.

On the prior appeal of this case, the Eleventh Circuit, in *Northeastern Florida Chapter v. Jacksonville, Florida,* 896 F.2d 1283 (11th Cir. 1990), concluded that a preliminary injunction was not warranted in that the record below was inadequate to sustain equitable relief. Joint Appendix at J.A.34-43. The Eleventh Circuit held that the AGC had failed to make the requisite showing of irreparable injury in that the association failed to bring forth representatives who could assert injury resulting from the City's enforcement of the affirmative action program.

No affidavit in support of the AGC's standing

was submitted into the record.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly dismissed the AGC's case for lack of standing. The decision on standing is consistent with Article III case and controversy requirements and Supreme Court precedent.

The Eleventh Circuit concluded that the AGC failed to demonstrate actual or imminent injury by virtue of the existence of the City's affirmative action ordinance. There was no individualized showing of specific injury. In particular, the AGC did not establish that one of its members had a personal stake in the controversy. It cannot therefore be determined whether a decision on the ordinance's constitutionality would likely redress the grievances of any AGC member.

The pleadings below stand as nothing more than a generalized complaint against the ordinance. The Eleventh Circuit properly refrained from adjudicating the case on the merits in the absence of a particularized injury.

To have done otherwise, would have been to render a decision on a purely hypothetical question in violation of Article III and the separation of powers doctrine.

The AGC defined its injury as economic, that is, "lost business opportunities and profits." This shaped the Eleventh Circuit's inquiry into whether any AGC member lost a contract because of the program. The AGC failed to identify such a member. The complaint remains deficient in the absence of particularized allegations, regardless of the AGC's attempt to broaden its stated injury under the "umbrella" of equal protection.

It should be highlighted that the AGC concedes that its evidence is insufficient to support standing at the summary judgment stage. The AGC did not come forward with a single affidavit on this essential element in its own summary judgment motion. The court was obligated to review the record *sua sponte* to determine if Article III case and controversy had been met.

Accordingly, the Eleventh Circuit's decision to dismiss the case without prejudice is proper in the face of the inadequate pleadings and the lack of standing evidence. Lastly, the subsequent repeal of the challenged ordinance rendered the appeal of this case moot.

I.
AGC LACKS STANDING BECAUSE IT FAILED TO ALLEGE WITH PARTICULARITY THAT ITS MEMBERS SUFFERED ACTUAL OR THREATENED INJURY.

Article III, Section 2 of the United States Constitution restricts the exercise of judicial power to deciding actual cases and controversies. The cornerstone of Article III standing is the constitutional doctrine of separation of powers. *Allen v. Wright*, 468 U.S. 737, 752 (1984). The federal courts are constrained within the constitutional framework to decide disputes upon a demonstration of injury. *Valley Forge College v. Americans United*, 454 U.S. 464, 471-474 (1982); *Lujan v. Defenders of Wildlife*, 504 U.S. --, 119 L.Ed.2d 351, 377 (1992) (Kennedy, J., with Souter, J., concurring in part and concurring in judgment). Any abandonment of this constitutional function of deciding actual cases would be a

usurpation of power over the other branches of government. *Frothingham v. Mellon*, 262 U.S. 447, 488-489 (1923).

Despite the absence of a precise definition of standing, case law has established its parameters. *Valley Forge College v. Americans United, supra,* 454 U.S. at 475-476; *Allen v. Wright, supra*, 468 U.S. at 751. The Supreme Court has declared that standing contains three basic elements. *Lujan v. Defenders of Wildlife, supra*, 119 L.Ed.2d at 364. A plaintiff must allege facts showing actual or future injury, fairly traceable to the challenged action and redressable by a favorable decision. *Allen v. Wright, supra*, 468 U.S. at 751. These are a condition precedent to maintaining any action. *Warth v. Seldin*, 422 U.S. 490, 518 (1975).

Where a plaintiff seeks declaratory and injunctive relief, standing is satisfied if it is shown that the defendant is likely to injure the plaintiff. Injury is established by demonstrating specific instances of past harm, and that the

challenged law mandates imminent unconstitutional conduct. *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974); *Los Angeles v. Lyons*, 461 U.S. 95, 102, 105-106 (1983). Article III demands that a plaintiff clearly and specifically set forth facts of injury sufficient to justify judicial review. *Warth v. Seldin, supra*, 422 U.S. at 501, 517-518.

Injury-in-fact is an invasion of a legally protected interest. *Lujan v. Defenders of Wildlife, supra*, 119 L.Ed.2d at 364. The legally protected interest must be concrete and particularized. *Warth v. Seldin, supra*, 422 U.S. at 508. The injury cannot be abstract, conjectural or hypothetical. *O'Shea v. Littleton, supra*, 414 U.S. at 494; *Los Angeles v. Lyons, supra,* 461 U.S. at 101-102. It should be actual or imminent. *Id.* at 102. Moreover, the injury must affect a plaintiff in a personal way. *Warth v. Seldin, supra*, 422 U.S. at 498; *Lujan v. Defenders of Wildlife, supra*, 119 L.Ed.2d at 364, n.1. A federal court's jurisdiction can be invoked only to protect against injury to

the plaintiff itself even though the ultimate judgment may benefit others collaterally. *Warth v. Seldin*, *supra*, 422 U.S. at 499. Without such allegations of injury, judicial review would be an encroachment on separation of powers.

In *Warth v. Seldin*, *supra*, the challenged conduct was a zoning ordinance that restricted the vast majority of vacant land to single-family housing. *Id.* at 495. Individual minority plaintiffs sued claiming the ordinance intentionally excluded them from residing within the town. *Id.* 495-496. An home builder association intervened claiming that the ordinance precluded them from building low cost housing thereby depriving them of profits. *Id.* at 497.

The Supreme Court affirmed the dismissal of the action on the ground of standing. The *Warth* Court held that the minority plaintiffs lacked standing because even though they shared attributes common to persons who may have been excluded, i.e. race or economic status, this was an insufficient predicate for the conclusion that they

themselves have been excluded. The *Warth* Court further stated that they must allege and show that they personally have been injured. Injury suffered by other unidentified members of the class to which they belong or purport to represent was not enough. "Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'" *Id.* at 502 *citing O'Shea v. Littleton*, *supra*, 414 U.S. at 494.

The *Warth* Court denied standing to the home builder association as well. The Court found that there was no particularized injury. Specifically, the complaint did not refer to a specific project of any member that was precluded either by the ordinance or by respondent's action in enforcing it. There was no allegation that any member had applied to respondents for a building permit or variance with respect to any then current project. There was no indication

that respondents had interfered with any project proposed by the members. In short, the association failed to show the existence of any injury to its members warranting judicial intervention. *Id.* at 516.

The demand for personalized injury is not eliminated because a plaintiff is an association nor is it enhanced. To establish representative standing, an association must allege that its members, or any one of them, are suffering immediate or threatened injury that would confer standing had the members themselves brought suit. *Warth v. Seldin, supra*, 422 U.S. at 511, 515; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39-40 (1976). The AGC's assertion that the Eleventh Circuit decision prevents representative standing distorts the ruling. Brief of Petitioner at pages 25-26 (hereinafter referred to as "Brief at ____). The Eleventh Circuit properly required the AGC to show that any one of its members are suffering immediate or threatened injury as a result of the challenged

ordinance. *Valley Forge College v. Americans United, supra*, 454 U.S. at 476 n.14. The AGC failed to do so.

The AGC's complaint failed to establish a personal stake in the case. From the four corners of the complaint, it cannot be ascertained whether AGC members are directly affected by the ordinance. The AGC's characterization of itself as a representative of non-minorities is insufficient to confer standing. Like the *Warth* individual plaintiffs, racial status is not enough. Moreover, like the *Warth* association plaintiff, the AGC does not identify a particular member who was not permitted to bid on a particular project. Nor does it demonstrate that any member was eligible to bid on any project designated under the ordinance. In short, the AGC's complaint suffers from the same infirmities as the *Warth* plaintiffs discussed above in relation to particularized injury. The Eleventh Circuit correctly concluded that the AGC did not allege an injury-in-fact as a result of the City's enactment of its affirmative

action ordinance.

The simple existence of the ordinance does not automatically mean that there will be imminent injury. Imminence means that a plaintiff will soon be exposed to the injury. *Los Angeles v. Lyons*, *supra*, 461 U.S. at 105-106; *Lujan v. Defenders of Wildlife*, *supra*, 119 L.Ed.2d at 367 n.2. Future injury is not shown when a plaintiff alleges only an injury at some indefinite time and the acts necessary for the injury to occur are at least partly within its own control. *Id.*

In *Lujan v. Defenders of Wildlife*, *supra*, the Court determined that stated vague intentions without any description of concrete plans or any specification when "some day" will be, do not support a finding of actual or future injury. *Id.* In the instant case, there is no allegation that any AGC member intends to bid on any future contracts let under the ordinance. Like *Lujan*, this contingency is within an AGC member's control. This is fatal to the claim

of standing.

Moreover, the AGC failed to establish that the ordinance mandated future unconstitutional conduct to its members. The AGC asserts that standing is established because bidding would be futile ten percent of the time. Brief at 30. There is no allegation in the complaint as to the percentage of construction contracts that have been let under the ordinance. The program is discretionary in that it contains waiver provisions. When a project is waived, the City may reduce the set aside goal by the contract amount. It is thus indefinite, uncertain and speculative that the City will set aside any construction contracts that any AGC member would be minimally eligible for. The Eleventh Circuit therefore found that the AGC failed to allege past concrete injury and that the likelihood of imminent injury was too speculative.

Standing further requires that the alleged injury will likely be redressed by a favorable outcome. *Simon v.*

Eastern Ky. Welfare Rights Org., *supra*, 426 U.S. at 38. There should be a high probability of tangible benefit to justify a court's intervention. *Warth v. Seldin*, *supra*, 422 U.S. at 508; *Simon v. Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 43-45. Without a detailed showing of particular injury, this element must be denied. In this case, the AGC's failure to identify a particular injury negates the Court's ability to determine whether an AGC member would benefit in a tangible way from a decision on the merits in its favor.

The requirement of Article III case and controversy is not a mere formality. It is a threshold determinant of every case before a federal court. *Warth v. Seldin*, *supra*, 422 U.S. at 518. The AGC below treated the necessity of sufficient allegations of standing as an inconsequential consideration. The Eleventh Circuit therefore correctly dismissed the lawsuit without prejudice.

II.
AGC's GRIEVANCE AGAINST CITY'S ORDINANCE WITHOUT A SHOWING OF PARTICULARIZED HARM IS AN ABSTRACT INJURY INSUFFICIENT TO CONFER STANDING.

The complaint in this case alleges essentially that the mere existence of the ordinance violates the law. The ordinance creates classifications which are based on race. The AGC claims this is an unconstitutional criteria. Its entire argument is premised on the belief that "[s]uch an allegation should be sufficient to establish standing to challenge the City's ordinance as written." Brief at 23. This is a superficial treatment of standing doctrine.

A party has no standing to complain that government is generally violating the law. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Valley Forge College v. Americans United, supra*, 454 U S. at 482-486; *Allen v. Wright*, *supra*, 468 U.S. at 754-756.

Consistent with separation of powers, a court may only review the legality of official action as incident to an actual case properly before it. *Frothingham v. Mellon*, *supra*, 262 U.S. at 488-489. Even a congressional enactment cannot lower the threshold requirements of standing under Article III. *Valley Forge College v. Americans United, supra,* 454 U.S. at 487 n.24;

Injury-in-fact means more than an injury to a cognizable interest. *Allen v. Wright, supra*, 468 U.S. at 755-756. It requires the party seeking review to be among the injured. This element of standing is satisfied with a party's demonstration of personal stake in the outcome. *Warth v. Seldin*, *supra*, 422 U.S. at 508. The plaintiff must allege an injury distinct and palpable to oneself, even if it is shared by others. *Id.* at 501.

The Supreme Court has faithfully adhered to this principle. *Schlesinger v. Reservists Committee to Stop the War, supra*; *United States v. Richardson*, *supra*; *Valley*

Forge College v. Americans United, supra; *Allen v. Wright*, *supra*. These cases denied standing because, among other things, each plaintiff failed to identify any personal harm as a consequence of the alleged constitutional violation. After analysis of the respective complaints, it was obvious that although each claimed a constitutional violation, they claimed nothing personal to themselves.

If abstract injury were cognizable, then members of any racial group would have standing to challenge purported discrimination regardless of personal impact. *Allen v. Wright*, *supra*, 468 U.S. at 755-756. "Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id. quoting United States v. SCRAP*, 412 U.S. 669, 687 (1983). A naked claim to standing, such as the AGC's complaint herein, has been previously discussed by this Court:

> Were we to recognize standing premised on an "injury" consisting solely of an alleged violation of a "'personal constitutional right' to a government that does not establish religion," *id.*, at 265, a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, **or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws,** to choose but two among as many possible examples as there are commands in the Constitution. (Emphasis added.)

Valley Forge College v. Americans United, supra, 454 U.S. at 489 n.26.

In *Allen v. Wright*, *supra*, the Supreme Court recognized the injury of racial stigma as one of the most serious consequences of discriminatory government action. Despite this, the Court denied standing because none of the plaintiffs had personally suffered a denial of equal

protection. The Court stated that an allegation of stigmatizing injury caused by racial discrimination supports a standing claim only to those who are personally denied equal protection:

> If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine.

Allen v. Wright, *supra*, 468 U.S. at 755-756.

The AGC cites numerous cases for the proposition that the Equal Protection Clause protects against government discrimination. This is correct. The Eleventh Circuit ruling does not, however, alter substantive equal protection law or standing doctrine. An allegation of

unequal treatment is insufficient to confer standing without particularized injury. For example, in *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984), the Court found standing because the plaintiff not only alleged unequal treatment, but also that he was personally injured. *See Allen v. Wright*, *supra*, 468 U.S. at 757 n. 22. In *Regents of California v. Bakke*, 438 U.S. 265 (1978), the Court found standing where the plaintiff had actually applied for admission to medical school and was allegedly denied admission on the basis of race.

Based on the above precedent, the Eleventh Circuit properly refused to hear this case on the merits. To have done otherwise, would have been to render an advisory opinion on the constitutionality of the ordinance.

The AGC accuses the Eleventh Circuit of distorting the principle of standing into a mechanical requirement of specific economic injury. Brief at 21. The AGC overlooks the fact that it defined its alleged injury in

economic terms. Specifically, the complaint is framed as a denial of business opportunities and lost profits. The complaint states, in pertinent part, that AGC members:

> [H]ave been damaged economically by being required to discriminate in the award of subcontracts . . . (Complaint ¶48), . . . have been deprived of substantial economic and business opportunities by being precluded from bidding on and performing subcontracts . . . (Complaint ¶49), [and] . . . have suffered, and will continue to suffer, irreparable harm and do not have an adequate remedy at law to terminate such discrimination and to recover the lost business opportunities and profits. . . ." (Complaint ¶52).

Despite the explicit allegations of the complaint, the AGC now claims that the lawsuit was not brought because of the loss of any contract. Brief at 12, 18. Rather, the AGC argues that the injury incurred was unequal treatment imposed generally by the ordinance's existence. The Eleventh Circuit decision requiring a showing of a specific lost contract was compelled by the AGC's

definition of its injury. Although the AGC claimed lost profits, it failed to allege that a particular contract was lost because of the ordinance. The court thus required the AGC to allege specific facts supporting the lost profits claim with more than mere conclusory statements of abstract injury. Accordingly, the Eleventh Circuit correctly found the complaint's purported economic injury to be insufficient in the context of Article III.

The Eleventh Circuit did not, and could not, embellish deficient allegations of economic injury to create standing. *See Whitemore v. Arkansas*, 495 U.S. 149, 155-156 (1990). If the AGC did not intend to argue lost profits as its injury, then it should not have done so in its complaint. It must now accept the responsibility for the consequences of its framing of the injury. In any event, regardless of the type of injury alleged, the AGC has failed to show any particularized injury whatsoever.

The AGC further argues that the Eleventh

Circuit's specific lost contract inquiry turns the distinction between 'facial' and 'as-applied' challenges "on its head."[1] It postulates that "[i]f judicial review of a government policy depends upon its application in a particular case, then there can be no challenges to those policies as written." Brief at 23. This reasoning is fundamentally flawed. Whether a challenge is 'facial' or 'as-applied', a plaintiff must set forth particularized injury as required by standing doctrine. To do otherwise, would permit a court to decide purely hypothetical questions in violation of Article III.

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[1]A facial challenge requires a demonstration that the government policy as written is not capable of any constitutional enforcement. A successful facial challenge requires the striking down of the ordinance. In contrast, an as-applied challenge requires a showing that the policy is being enforced in an unconstitutional manner. A successful as-applied challenge forbids the invalid application but does not invalidate the ordinance.

III.
AGC FAILED TO SUPPORT ITS MOTION FOR SUMMARY JUDGMENT WITH EVIDENCE OF PARTICULARIZED INJURY.

The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *FW/PBS, Inc. v. Dallas*, 439 U.S. 215, 231 (1990). These elements must be supported in the same manner as any other upon which a party bears the burden of proof. Summary judgment must be entered against a party who fails to establish elements essential to its case. *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). A party cannot rest on its pleadings but must set forth specific facts of standing by affidavit and other evidence. Fed.R.Civ.P. 56(e); *Lujan v. Defenders of Wildlife*, *supra*, 119 L.Ed.2d at 364-365.

The AGC admits that it lacked evidence establishing its standing at the summary judgment stage. Brief at 30-31. To survive the motion for summary

judgment, the AGC had to submit affidavits or other evidence showing specific facts that one or more of its members would be personally harmed. It failed to do so. A court could thus reasonably find that no concrete injury existed to satisfy the AGC's standing.

There is no reason for this Court not to apply the summary judgment standard of review in the instant case. Both parties below moved for summary judgment. The AGC argues that it did not have notice that standing was an issue.[2] However, standing is so critical to constitutional separation of powers doctrine that a court must *sua sponte* review the question, regardless of whether the parties even raise it. *See e.g. Juidice v. Vail*, 430 U.S. 327, 331 (1977).

The AGC states further that the Eleventh Circuit held it to a new requirement of Article III case and controversy. This is not accurate. As demonstrated

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[2]It should be noted that a court has the authority to enter summary judgment *sua sponte*. *See Celotex Corp. v. Catrett, supra,* 477 U.S. at 326.

previously, the Eleventh Circuit applied traditional standing doctrine. In any event, this does not excuse the AGC's failure to submit a single affidavit establishing standing in support of its motion for summary judgment.

Accordingly, the Eleventh Circuit properly dismissed the case without prejudice, because the AGC did not meet the burden of demonstrating standing to sustain this lawsuit.

IV.
CITY'S REPEAL OF THE CHALLENGED ORDINANCE MOOTS THIS APPEAL.

The City adopts and incorporates herein by reference the arguments presented in its motion to dismiss as moot, which the Court denied on December 14, 1992. The City substantially redrafted its ordinance, conducted numerous public hearings and created a contemporaneous record when it enacted the current ordinance. The basis for the grant of summary judgment below has been eliminated by legislative action.[3]

The Eleventh Circuit dismissed the AGC's case without prejudice. The Court of Appeals should be affirmed.

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[3]The AGC also concedes that the grant of summary judgment below was unwarranted in that it failed to establish standing at this stage of the proceedings. Brief at 30-31.

CONCLUSION

The AGC failed to plead and prove injury with particularity to any of its members. For all the reasons stated above, the City respectfully requests that the United States Supreme Court affirm the judgment of the Court of Appeals, or alternatively, dismiss the appeal as moot.

Respectfully submitted,

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